

*Maine Land Use Regulation
Commission*

*Compliance and Enforcement Response
Policy*

March 1992

A LURC Guidance Document

Maine Land Use Regulation Commission
Compliance and Enforcement Response Policy
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Maine Land Use Regulation Commission
Compliance and Enforcement Response Policy

I. Introduction and Purpose

The Maine Land Use Regulation Commission was established by the Legislature in 1971 to extend the principles of sound planning, zoning and subdivision control to the unorganized townships and plantations of the State of Maine. Those areas today encompass 10.5 million acres, nearly one half the geographic area of Maine. The Commission encourages well-planned and well-managed, multiple use of land and natural resources, and encourages the appropriate use of these lands by the residents of Maine and visitors.

A necessary component of an effective land use regulation program to meet the goals and principles of the Commission is the establishment of a comprehensive program which results in compliance with the Commission's laws, Standards and permits. This must provide for prompt, equitable and appropriate response to those who violate Commission laws, Standards, permits or other requirements. Evaluating projects and issuing permits are meaningful activities only if standards and permit conditions are to be enforced. Moreover, the program must provide adequate disincentives for undertaking regulated activities without first obtaining necessary permits, if such a program is to be effective. Providing education and training on land use standards and promoting full understanding of the value of proper land uses and resources are equally important to the success of the Commission's programs.

This Policy provides the framework for compliance and enforcement strategies. This document sets forth the Commission's policy for administering and developing administrative penalties under 12 M.R.S.A. §681 et seq., using a system for penalty development based upon the seriousness of violations. It assures penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with the land use regulation laws are eliminated; that persons are deterred from committing land use regulation violations; and that compliance is achieved. Implementing this Policy in a consistent manner will over the long term result in high levels of compliance with Commission requirements by the regulated community and result in increased confidence by the public in the land use management and oversight program administered by the Commission.

In 1980, the Commission adopted its first major enforcement policies for strengthening its compliance program. These policies were refined in December 1986. Ten policy considerations provided guidance to the enforcement program, ranging from discussion of violation avoidance to executive sessions, to assessing monetary penalties for violations. Those enforcement policies, while superseded by this Policy, form the basic policy principles from which this Policy is developed.

II. Statutory Authority

A 12 M.R.S.A. §685-C

12 M.R.S.A. §685-C(8), among other things, provides that the Standards, rules, permits and orders issued by the Commission have the force and effect of law. For the purposes of inspection and to assure compliance with standards, rules, orders and permits issued or adopted by the Commission, Commission staff or authorized consultant personnel may conduct investigations, examinations, tests and site evaluations deemed necessary to verify information presented to it, and may obtain access to any lands and structures (within constitutional limits) regulated under 12 M.R.S.A. §681 et seq.

The law further provides that any person who violates any provisions of the land use regulation laws, or the terms of any conditions or standards, rules, permits or orders adopted or issued by the Commission is subject to a civil penalty payable to the State, of up to \$10,000 for each day of violation. A person who willfully or knowingly falsifies any statement contained in a permit application or other information required to be submitted to the Commission is in violation of the land use regulation laws and is subject to the penalties established by law.

III. Applicability and Scope

This Policy applies to administrative enforcement actions undertaken by the Commission for activities over which it has jurisdiction under 12 M.R.S.A. §681 et seq.

This Policy provides internal guidelines to aid the Commission's enforcement personnel in assessing appropriate penalties. It also provides a mechanism whereby enforcement personnel may, in connection with matters that will not require judicial action, within specified boundaries, negotiate administrative settlement agreements, and modify the proposed penalty when special circumstances warrant it.

The procedures set forth in this document are intended solely for the guidance of Commission personnel. They are not intended and may not be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the State of Maine. This is not a judicial civil penalty policy and as such may not be relied upon as such a policy. The Commission reserves the right to act at variance with this Policy and to change it at any time without public notice, as it deems appropriate to accomplish its legal mission.

IV. Relationship to Other Agency Policy & Guidance

This Policy is consistent with the established goals and policies of the Commission as set forth in the Commission's Comprehensive Land Use Plan, as amended in June 1990. These goals and policies, among others, consist of:

- A. Administering an effective enforcement and education program with respect to the laws, permits, regulations and standards of the Commission, in order to assure awareness and compliance by:

- 1 carrying out balanced but vigorous enforcement effort to identify, investigate and pursue significant violations of laws and rules administered by the Commission;

providing deterrence to acts of violation;

training and utilizing field staff of other willing State agencies to disseminate information to the public and report acts of noncompliance to the Commission;

holding land owners and land managers principally responsible for land use violations taking place on their lands; and

conducting educational programs for the regulated community and the general public concerning environmentally sound land use practices and other legal requirements administered by the Commission.

- B. Arriving at a just settlement of a violation, including the assessment of a monetary penalty, considering:

the potential or actual environmental damage resulting from the violation;

- (2) the extent and significance of the violation;

- 3 the environmental record of the person causing the violation, including any history of prior violations;

- (4) extent to which the person knew or should have known of the laws, standards or other requirements violated;

- (5) responsiveness of the person causing the violation to report and end the violation; and

- (6) remedial measures undertaken by or on behalf of the person committing the violation.

- C. Handling similar violations involving similar circumstances in a similar manner.

V. Definitions

The following terms have the following meanings unless the context indicates otherwise:

A **Commission.** "Commission" means the Maine Land Use Regulation Commission. This term also includes the Commission's staff where a Commission action or responsibility has been delegated to staff.

B. **Contractor.** "Contractor" means contractors, operators or agents who are retained by or on behalf of a land owner to perform an activity.

C. **Director.** "Director" means the executive director of the Commission or the executive director's designee.

D **Major.** When used in determining the potential for harm, "major" means actual and substantial, severe, or extensive damage to the environment or a community or harm to public health or safety, or the substantial likelihood that such damage or harm may occur as a result of a regulated activity. By way of example, this may include extensive siltation of a water body, significant loss of habitat, including, without limitation, extensive encroachment into fish and wildlife or wetlands protection subdistricts, endangerment to rare, threatened, or endangered species, degradation of surface or ground waters, or substantial adverse effects on a natural or human environment.

When used in determining the extent of deviation from standards, "major" means substantial or extensive deviation from Commission requirements. By way of example, this may include the failure to comply with a particular standard, performance of an activity well in excess of the limitation imposed by a standard, conducting a prohibited activity or failure to obtain necessary permits for a development or other regulated activity.

E **Minor.** When used in determining the potential for harm, "minor" means damage to the environment or a community or harm to public health or safety that is inconsequential, de minimus, or slight and momentary in duration, or the relatively high likelihood that effects as a result of a regulated activity will cause slight or no damage to the environment or harm to public health or safety. Adverse effects are easily reversible.

When used in determining the extent of deviation from legal standards, "minor" means slight deviation, the effect of which is inconsequential, or a deviation somewhat from a particular standard but where nearly all applicable provisions of that standard are met. By way of example, this may include road construction that meets the technical requirements except the width of required buffer from a water body varies slightly from that required given the particular slope of land.

F **Moderate.** When used in determining the potential for harm, "moderate" means actual damage or other adverse effects to the environment or a community or harm to public health or safety that is neither major nor minor, or the significant likelihood that such damage or harm may occur as a result of a regulated activity. The activity has or is likely to have effects of adverse consequence, though not severe.

When used in determining the extent of deviation from statutory or regulatory requirements, "moderate" means significant deviation from a particular standard or standards

but where some provisions of the standard or standards are implemented as required. Such deviation has an adverse regulatory effect when considered separately or associated with the cumulative effect of the activity if left uncorrected. By way of example, this may include some siltation of a water body but where such adverse effects can be remedied promptly.

G. **Respondent.** "Respondent" means the person committing or otherwise responsible for a violation of standards of the Commission.

H. **Standards.** "Standards" means the laws administered by the Commission and the rules, regulations, performance criteria,, application and permit requirements (including permit terms and conditions), orders and other requirements of the Commission.

VI. Education

The Commission regards education of the those who live, work, or have occasion to recreate in the Commission's jurisdiction, in matters relating to land use standards, as an important and integral component of an effective land use regulation program. It finds that having a public and regulated community which is knowledgeable of land use regulation laws and standards and sound land use practices further the goals and objectives of the Commission, and will result in high levels of voluntary compliance with those laws and standards. Toward that end, informational mailings, outreach seminars for the general public, and specialized training programs for the regulated community and other interested persons will be carried out by Commission staff periodically each year.

VII. Compliance and Inspections

A General

The Commission administers a program to assure compliance with the Commission requirements by the regulated community. This is done primarily by:

maintaining staff in regional offices throughout the jurisdiction, with offices in Ashland (part-time), Greenville, Old Town and Presque Isle, in addition to those in the central office located in Augusta;

- (2) performing periodic inspections of permitted or otherwise regulated activities, including sampling or testing as appropriate;

conducting compliance inspections at the request of a permittee for the purposes of issuing a certificate of compliance upon a demonstration that a site or activity is in compliance with land use requirements;

investigating complaints of alleged violations; and

conducting training and public outreach seminars to inform the regulated community and the general public of Commission requirements and sound land use practices.

B. Protocol

Reports of alleged violations will be documented in writing on forms approved by the Director. The Commission will respect the wishes of complainants who for various reasons may wish that their name not be disclosed in the ordinary course of an administrative enforcement proceeding.

Inspections and investigations will be carried out in accordance with procedures established by the Director. Results of inspections and investigations will be documented in writing on appropriate forms, in accordance with procedures established by the Director.

- (3) Inspections will be carried out by Commission staff or on behalf of the Commission staff by representatives authorized by the Director. Those inspections will be carried out in a professional manner, with the staff or authorized representatives identifying their affiliation to those present on a site and disclosing the reason for their appearance.

Written notice of apparent violations of Commission standards ordinarily will be provided to the respondent following investigation, in accordance with the provisions of this Policy and with procedures established by the Director.

VIII. Enforcement Response

A. Summary

In seeking to achieve a high level of compliance by the regulated community and prompt return to compliance for those activities which result in noncompliance with land use standards, the Commission will apply a range of enforcement responses. Appropriate responses must reflect circumstances related to particular cases, but generally will depend, among other things, upon the seriousness of the violation, effect of the violation on the environment, and the responsiveness and compliance history of the respondent. It is the policy of the Commission, whenever feasible, to bring noncomplying activities into full compliance with applicable Commission standards, and require appropriate remediation or restoration. It recognizes, however, that this goal is not always obtainable. In this regard, full conformance may not be required by the Commission where achieving it is likely to result in greater environmental damage. Moreover, full compliance may not be required in the discretion of the Director in exceptional cases where:

the violation does not appear to have been willfully or knowingly caused by the present owner of land;

the deviations from standards are minor;

there is no threat of continuing environmental damage or public health or safety threats;

the costs of requiring full compliance are clearly inappropriate in view of the environmental or other public gains to be realized;

the respondent has made sufficient efforts to end the violation and to comply with applicable requirements; and

such continued noncompliance will not adversely affect owners of adjacent lands or the public interest.

The monetary penalty should reflect any circumstance of continued noncompliance.

B. Types of Enforcement Response

The Commission utilizes a number of administrative enforcement mechanisms to respond to acts of noncompliance. These are summarized as follows:

- (1) **Immediate On-site Resolution** This is an informal approach used on a site when very minor infractions occur or may occur and where immediate direction to the respondent will prevent or immediately correct the deficiency.
- (2) **Letter of Warning** This is a written notice which identifies and explains the violation, and cites the standard violated, and states that if compliance is not achieved within a specified period, further enforcement action will be initiated. It is used for minor infractions where some response or minor corrective action by the respondent is required.

Notice of Violation This is a written notice which identifies and explains the violation, cites the appropriate provision violated, prescribes actions to be taken to bring about compliance, and either sets out a schedule for compliance, requires the respondent to submit a proposed schedule or requires certification of compliance. Depending upon the nature of the violation or the responsiveness of the respondent, a Notice may or may not be followed by further enforcement action. It is used for all moderate and major violations.

- 4) **Administrative Order by Consent** This is an administrative action by the Commission involving consent of the respondent that directs the respondent to return to compliance within a certain period by taking certain

prescribed actions. Prior to the issuance of a compliance order, the Commission may hold an enforcement hearing on the violation and provide prior written notice of that hearing to the respondent.

Enforcement Action This is a process preparatory to either a settlement action or referral to the Department of Attorney General. Violations which are severe, highly controversial or involve issues of precedence for the Commission will be presented to the Commission for its deliberation. Such exceptional violations may involve precedent-setting decisions including complex interpretations of law, large monetary penalties, unusual remedial or corrective measures, major damage or potential for major damage, or unusual circumstances regarding the cause of violation. Following presentation of the enforcement action by the staff and deliberation, the Commission will determine whether to authorize a settlement to be negotiated by the staff or to refer the matter to the Attorney General for further enforcement action. This proceeding is an informal one, and the respondent will be offered the opportunity to participate.

Administrative Settlement Agreement This is an administrative action whereby the Commission, through its staff, negotiates a settlement of the violation with the respondent. Participation by the respondent is on a voluntary basis. The settlement agreement is a three party agreement between the Commission, the respondent and the Department of Attorney General and is contractually binding on the parties. Such agreements must be ratified by the Commission at a scheduled Commission meeting. Principal elements of a settlement agreement ordinarily include the following:

- i. identification of the respondent and location of business;
- ii. agreement to the Commission's regulatory authority over the matter;
- iii. admission of responsibility for the violation;
- iv. description of the violation;
- v. corrective measures that must be taken by the respondent to bring about compliance and time schedule for implementation of those measures;
- vi. payment of a monetary penalty to the State
- vii. waiver of rights of appeal by the respondent; and
- viii. conditional release by the Attorney General and Commission for causes of action they may have against the respondent.

- 7 Referral to Department of Attorney General Following staff consultation with the Attorney General's Office and mutual determination of enforcement priorities and possible courses of action, the Commission may refer a violation to the Attorney General's Office for judicial prosecution. This referral may be undertaken in the first instance by the staff; or following unsuccessful settlement discussions by the staff; or following presentation of an enforcement action by the staff. Upon referral of the matter to the Attorney General's Office, the Commission staff will assist the Attorney General's Office in case preparation and prosecution, as requested by the Attorney General lawyer assigned to the case.

C. [Reserved]

D. Time Frames for Response

The Commission recognizes that timely investigation and enforcement of land use regulation violations are important for an effective compliance and enforcement program, and that those affected by a land use complaint are interested in a prompt determination of the enforcement status of that complaint whenever possible. However, the Commission also appreciates the limitations inherent in the enforcement mechanisms and staff resources available to the Commission to resolve violations. Therefore, in recognition of these factors, the Commission establishes the following as a general goal for taking timely and appropriate enforcement responses:

Initial response to complaint: 5 business days

Violation Determination 45 calendar days

Violation resolution or referral to the Attorney General: 180 calendar days

E. Calculation of Civil Penalty

(1) Summary

The system set forth herein is for guidance of the Commission staff in seeking voluntary settlement and compliance with a respondent in an enforcement matter. This system is not designed to determine penalties or other remedies in a matter that has been referred to the Attorney General for judicial enforcement. Such matters ordinarily require more substantial penalties, up to the legally authorized maximum of \$10,000 per day, together with all appropriate remedial measures.

The penalty calculation system consists of (1) determining a base penalty for a particular violation based upon the seriousness of the violation; (2) considering economic benefit of noncompliance where appropriate; and (3) adjusting the penalty for special circumstances. Two factors are considered in determining the base penalty:

potential for harm to the environment or public health or safety; and

extent and number of deviation(s) from a statutory or regulatory requirement including, but not limited to, those contained in the Commission's Land Use Districts and Standards.

These two factors constitute the seriousness of violation under the land use regulation laws and standards, and have been incorporated into a matrix from which the base penalty will be chosen.

Where a company or person has derived significant savings by failure to comply with land use requirements, the amount of economic benefit from noncompliance gained by a respondent will be considered in determining the penalty over the base amount.

After determining the appropriate base penalty based upon its significance and, where appropriate, economic benefit the penalty may be adjusted upward or downward to reflect particular circumstances surrounding the violation. The factors that should be considered are:

- (a) good faith efforts;
- (b) degree of willfulness and/or negligence;
- (c) history of noncompliance;
- (d) inability to pay; and
- (e) other unique factors

The penalty calculation includes appropriate assessment of multiple and multi-day penalties.

(2) Calculation of Base Penalty

(a) Administrative Record

In order to support the penalty developed in a settlement agreement, the enforcement staff will ordinarily include in the case file an explanation as to how the proposed penalty amount was calculated. In ongoing enforcement cases, the assessment rationale is exempt from mandatory disclosure requirements of the Freedom of Access law, 1 M.R.S.A. 402(3).

Determination of the Base Penalty

Seriousness of a violation is based on two factors which are used to assess the appropriate base penalty:

- i. the potential for harm to the environment or public health or safety; and
- ii extent of deviation from a statutory or regulatory requirement.

Enforcement staff should evaluate whether the potential for harm and the extent of deviation from Commission requirements are major, moderate, or minor in a particular situation and establish a base penalty using the following matrix:

Penalty Matrix

Extent of Deviation from Statutory or Regulatory Requirements

		Major	Moderate	Minor
Potential for Harm	Major	\$ 10,000	\$ 9,000	\$ 6,000
		to	to	to
		\$ 7,000	\$ 4,500	\$ 3,000
	Moderate	\$ 4,200	\$ 3,200	\$ 2,000
		to	to	to
		\$ 2,100	\$ 1,600	\$ 1,000
Minor	Minor	\$ 1,500	\$ 900	\$ 550
		to	to	to
		\$ 750	\$ 400	\$ 200

(3) Multiple and Multi-day Penalties

A separate penalty may be assessed for each violation that results from an independent act (or failure to act) by the respondent and is substantially distinguishable from any other violations. In general multiple penalties are not appropriate where the violations are not independent or significantly distinguishable. In those circumstances, the violations should be cited in a settlement agreement, but one penalty only should be assessed.

12 M.R.S.A. §685-C(8) provides the Commission with authority to seek penalties up to \$10,000 per violation per day, with each day that noncompliance continues to be assessed as a separate violation. Multi-day violations generally should be calculated in the case of continuing egregious violations. However, a per day assessment may be appropriate in other cases as well.

(4) Economic Benefit Derived from Noncompliance

This component includes consideration of the economic benefit of noncompliance to a respondent when penalties are assessed. An "economic benefit" component is calculated and added to the base penalty when a violation results in significant economic benefit to the respondent. Where it appears the economic benefit derived is de minimus, staff need not include an economic benefit assessment when arriving at a penalty amount. Economic benefit may be derived from either cost savings or direct economic gain.

Cost savings, hence an economic benefit, may be as a result of either delayed costs or avoided costs. Delayed costs are expenditures which have been deferred by a respondent's failure to comply with the requirements. The respondent eventually will have to spend money in order to achieve compliance. In general terms, delayed costs represent capital costs. For example, the failure to install a fish ladder at a dam site or a phosphorus control/retention pond, construct a road or to replace a substandard sewage disposal system represent delayed costs.

Avoided costs are expenditures which are nullified by a respondent's failure to comply. Avoided costs generally represent operating and maintenance costs. For example, failure to perform required groundwater monitoring and analysis or perform certain required operation or maintenance activities represent avoided costs

Alternatively, a respondent may realize an economic benefit, not by cost savings, but by deriving an economic gain by performing a revenue-producing activity that is otherwise prohibited or limited. For example, a respondent may realize economic benefit by harvesting marketable timber in excess of the standards in a Fish & Wildlife Protection subdistrict.

Use of this adjustment component is important to remove incentives for noncompliance and nullify any competitive business advantage gained by the respondent over another by the act of noncompliance.

(5 Penalty Adjustment Component

The seriousness of the violation determines the base penalty. The reasons the violation was committed, the intent of the person who committed the violation, and other factors related to the respondent are not considered in choosing the appropriate penalty from the matrix. However, any penalty system must be flexible enough to make adjustments to reflect legitimate differences between similar violations and still result in equitable treatment given the circumstances involved. The adjustment factors can increase, decrease or have no effect on the penalty amount paid by the respondent. This section sets out several adjustment factors that should be considered. These include:

- a) good faith efforts;
- (b) degree of willfulness and/or negligence;
history of noncompliance;
- (d) inability to pay;
penalty offset provision; and
other unique factors.

In general these adjustment factors will apply only to the base penalty and not to any economic benefit component, except that the inability to pay factor should be applied comprehensively.

(a) Good faith efforts

Good faith efforts to promptly implement corrective measures should be considered in assessing a penalty. Self-reporting of a violation and prompt correction of environmental problems can constitute "good faith efforts". Lack of such actions, conversely can result in increased penalty. No downward adjustment should be made if the actions taken primarily consist of coming into compliance.

(b) Degree of willfulness and/or negligence

In assessing the degree of willfulness or negligence, the following factors may be considered:

- i. how much control either directly or indirectly the respondent had over the events constituting the violation;
- ii. Whether the respondent knew or should have known of the risks associated with the activity or conduct;
- iii. whether the respondent took reasonable precautions against the events constituting the violation;
- iv. whether the respondent knew or should have known of the legal requirements which were violated; and
- v. how quickly the violation was remedied by the respondent.

Lack of knowledge of the legal requirement should not be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, acts of noncompliance by a respondent having knowledge of the law should serve only to enhance the penalty.

(c) History of noncompliance (upward adjustment only)

Where a person has violated land use regulation requirements in the past, this may indicate that the person was not deterred by a previous enforcement response. Factors that should be considered with respect to prior violation history are:

- i. how similar the previous violation was;
- ii. how recent the previous violation was;
- iii. number of previous violations; and
- iv. respondent's response to the previous violation(s) with regard to correcting the problem.

(d) Inability to pay (downward adjustment only)

There is little to be gained from seeking penalties that are demonstrably beyond the means of the respondent. Therefore, the Commission should consider the ability of a respondent to pay a penalty. The burden of proof to demonstrate inability to pay rests with the respondent. When it is determined a respondent cannot afford to pay a portion of a penalty, the Commission may consider the following options:

- i. a delayed payment schedule;
- ii. installment payment plan, with or without interest; and
- iii. direct penalty reductions

Amount of any downward adjustment of a penalty is dependent upon the individual financial circumstances of the respondent.

(e) Penalty offset provision

The monetary penalty may be partially offset when the respondent proposes as part of a settlement agreement to undertake an activity that will provide environmental or land use benefits to the State beyond what is required to bring a site or activity into compliance. The monetary penalty actually paid and the amount allowed as an offset together must be greater than 125 percent of the penalty that would otherwise be assessed if an offset was not applied. The decision to allow an offset is wholly discretionary with the Commission and Attorney General when they determine there is a significant benefit to the public interest.

(f) Other unique factors

This policy allows for a limited adjustment for unanticipated and unusual factors which may arise on a case-by-case basis, at the discretion of the Commission.

F. Delegation

Where circumstances arise which may cause harm to the environment or pose a threat to public health or safety, the Commission delegates authority to the Director to take all actions necessary to prevent or reduce such harm or threat, including, but not limited to, seeking injunctive relief through the Attorney General. In addition, the Director may enter into agreements with other agencies from time to time as the Director deems advisable to further the effective enforcement of the Commission's programs.

Furthermore, the Commission delegates authority to the Director to resolve certain classes of violations, including:

- (1. violations involving activities conducted without necessary Commission permits except those of an exceptional nature; and

- (2) violations involving noncompliance with statutory provisions, permit terms or conditions, or Commission standards except those of an exceptional nature.

For these classes of violations, the Director is authorized to enter into settlement agreements or, alternatively if settlement is unlikely, directly refer the matters to the Department of Attorney General. Settlement agreements entered into by the Director will be presented to the Commission for ratification.

G. Executive Sessions

Commission discussion of pending enforcement matters, content of settlement agreements, penalties, and legal strategies for resolving violations will be held in executive sessions. Settlement agreements or other final actions by the Commission require Commission action at a scheduled public meeting.

IX. [Reserved]

X. Land Owner Responsibility

The Commission finds that owners of land on which regulated activities occur are responsible for those activities. As such, they will be held responsible for assuring that the actions undertaken on their lands including those by contractors are in compliance with all applicable Commission requirements. Furthermore, land owners and land managers have an obligation to assure that contractors undertaking activities on their lands are properly trained and are advised of Commission and other relevant land use and environmental requirements. The Commission recognizes, however, that in certain limited circumstances it may be appropriate to pursue enforcement against a contractor for a violation either jointly with the landowner or alone. In determining whether to pursue an action against a contractor, the Commission will consider the following:

- A nature of the activity which resulted in the violation;
- B. impact of the activity on the land owner
- C. land owner's involvement in planning, arranging for supervising, conducting, or allowing the activity;
- D. land owner's knowledge of the activity;
- E. competitive advantage or other benefit gained by a contractor by the act of noncompliance;
- F. deterrent effect to be realized by the Commission's enforcement response to the violation; and
- G such other factors as are relevant to a particular case.

Notwithstanding the above, nothing in this Policy shall be construed to prevent the Commission from settling with a land owner and/or contractor or, alternatively, referring the matter to the Department of Attorney General for prosecution against the land owner and/or the contractor or other party determined by the Attorney General to have legal responsibility.

XI. Settlement Agreements

A. Settlement Encouraged.

The settlement agreement is an important enforcement tool for the Commission in that it represents a practical mechanism to compel corrective action and fully resolve a violation without having to resort to a judicial remedy. The Commission encourages the Director, in cooperation with the Department of Attorney General, to enter into settlement discussions and settlement agreements with respondents so long as the settlement is consistent with the objectives of the land use regulation laws and standards and this Policy.

B. Protocol

Whenever the Director determines that a violation of law warrants civil enforcement with a monetary penalty, the Director will notify, in writing, the respondent and seek to negotiate a settlement to resolve the violation in accordance with this Policy. The notice will set forth in clear and concise language:

the law, standard, rule or permit violated;

- (2) a factual statement sufficient to inform the person with reasonable certainty, of the acts or measures which constitute the violation; and a time by which the person must respond to the notice; and

a general description of the procedures of this Policy, so a respondent can understand the process being used to respond to the violation and what recourse is available if the respondent disputes the agency's position.

C. Settlement Discussions.

Settlement discussions will be entered into by the Director in good faith as a means of settling a violation. These discussions are for settlement purposes only. As such, they may not bind the Commission, nor may any representations made by the staff be used or relied upon in any proceeding, except where a settlement agreement reflecting those discussions has been entered into by the Commission and Attorney General.

D. Commission Action

All settlement agreements arranged by the Director will be presented to the Commission for its ratification at a scheduled meeting. The Commission will ordinarily accept and enter into settlement agreements presented to it by the Director when the settlement agreements, including penalty amounts, have been developed in accordance with this Policy.

XII. [Reserved]

XIII. [Reserved]

XIV. Inter-agency Coordination

A. Attorney General

The Commission recognizes the independent authority of the Attorney General to act on the Attorney General's own initiative with respect to any violation of law.

Where deposition of any matter involves settlement of a legal violation or otherwise involves the waiver of the State's right to prosecute a violation, the Attorney General will be a necessary party to the Agreement.

It is understood that in cases where staff efforts to reach a settlement agreement have not been successful, the Department of Attorney General will generally seek to support and pursue a position no less rigorous than that taken by staff in applying the terms of this Policy.

B. Use of Law Enforcement Powers

The Commission has not been granted such law enforcement powers as power of arrest and prosecution or to unilaterally assess monetary penalties for a violation. Its staff are not law enforcement personnel and are not authorized to carry or use armed force.

Of note, 12 M.R.S.A. §8901(3) grants law enforcement powers to forest rangers and the state supervisor (within the Maine Forest Service), for the purposes of enforcing laws of the Commission. The powers granted are equivalent to those of a sheriff or sheriff's deputy, and include the right to arrest violators, prosecute them, serve criminal process against offenders, require aid in executing forest ranger duties and deputize temporary aides.

The Commission is the principal authority responsible for oversight of land use activities within its jurisdiction. As such, it is the policy of the Commission that law enforcement personnel consult with the Director and seek the Director's approval prior to use of such powers in enforcing Commission laws. Except, however, if a law enforcement officer determines that an emergency exists such that taking immediate action to enforce land use regulation laws is necessary to protect public health or safety, the environment or property, the Director should be notified within 24 hours of the law enforcement officer having taken such emergency actions.

C. Use of Court Rule 80K

The Commission currently does not have statutory authority to enforce its land use laws and rules in District Court under Maine Rules of Civil Procedure Rule 80K. However, some governmental entities, including the Department of Environmental Protection, have been granted that authority, pursuant to 30-A M.R.S.A. §4221(2).

Again, the Commission is the principal authority responsible for oversight of land use activities within its jurisdiction. As such, it is the policy of the Commission that no state executive agency initiate an enforcement action for the violation of its laws within the jurisdiction of the Commission, on behalf or in lieu of the Commission, without prior consultation and approval by the Director, in which case the Director shall be guided by this Policy.

D. Inter-agency Agreements

The Commission may enter into agreements with other governmental entities to further the goals and objectives of the Commission including, but not limited to, for the purposes of disseminating information to the regulated community and the general public, carrying out resource inventories, identifying violations and conducting inspections.

Of note, the Commission entered into an inter-agency agreement with the Maine Forest Service, Department of Conservation on March 12, 1990 to assist the Commission in conducting inspections and reporting acts of noncompliance. Similarly, the Commission regularly receives the cooperation of personnel of the Maine Department of Inland Fisheries and Wildlife with respect to investigation of enforcement matters.

XV. Effective Date

This Compliance and Enforcement Response Policy is applicable after adoption by the Maine Land Use Regulation Commission and should be used to calculate penalties for settlement of enforcement actions instituted after the effective date of the Policy, regardless of the date of violation.

ADOPTED BY THE MAINE LAND USE REGULATION COMMISSION
THIS 19TH DAY OF MARCH, 1992.

By: David E. Boulter
David E. Boulter, Director

Effective: March 19, 1992